IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE R.BASANT

THURSDAY, THE 9TH AUGUST 2007 / 18TH SRAVANA 1929

Bail Appl..No. 4644 of 2007()

CRIME NO.82/07 OF CHENGANNUR EXCISE RANGE.

PETITIONER/ACCUSED

JOSEPH @ KUNJUMON, S/O ALLASH,
AGED 38 YEARS, RESIDING AT PLAPPALLIL
VADAKATHIL VEEDU, ENNAICKAD VILLAGE,
CHENGANNUR, ALAPPUZHA DISTRICT.

BY ADV. SRI.P.GOPAKUMARAN NAIR
SRI.C.S.DIAS
SRI.AJITH MURALI
SMT.R.BEENA

RESPONDENTS: COMPLAINANT

STATE OF KERALA, REPRESENTED BY THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,ERNAKULAM.

BY D.G.P. SRI.P.G. THAMPI.

THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON 09/08/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

R. BASANT, J.

B.A. No. 4644 OF 2007

Dated this the 9th day of August, 2007

ORDER

Application for anticipatory bail. The petitioner faces allegations under Sec.55 of the Kerala Abkari Act. The crux of the allegations in the crime is that an Excise official was given information by a person travelling in a vehicle that some contraband articles were kept at a particular place. The Excise party proceeded to that place. They found the information to be correct. 175 litres of arrack in 5 containers were found concealed. They were seized as per a seizure mahazar. The seizure mahazar prepared shows that the detecting officer had specifically recorded that the enquiry revealed that the petitioner was the one who kept the articles there. Accordingly, in the seizure mahazar and in the occurrence report the petitioner has been shown as the person responsible for the concealment of the contraband liquor.

2. When the matter came up for hearing on the last occasion, the Case Diary was placed before me for perusal. The Case Diary shows that it was not being maintained properly at all. The Excise officials, who are now given power to investigate and submit a final report, must carefully and scrupulously ensure that the Case Diaries are maintained properly in a foolproof manner. Explanation was called for. The Officer/ Investigating Officer had appeared in person. The learned Director General of Prosecutions entered appearance to explain the conduct on the part of the detecting and Investigating Officers. A statement has been filed. The statement does also reveal that the Case Diaries are not maintained properly as is expected from a responsible official conducting investigation. The learned D.G.P. submits that necessary instructions shall be given and the needful shall immediately be done to ensure that the Case Diaries in Excise crimes are maintained by the investigating Excise Officials in a proper and appropriate manner. I accept the submission of the learned D.G.P. and assume that the needful shall be done. I leave the matter there.

3. Be that as it may, the question is whether the petitioner is entitled to the invocation of the discretion under Sec.438 of

the Cr.P.C. Significantly and crucially, no allegation of mala fides is raised against any one as to why the petitioner is unjustifiably and unnecessarily arrayed as an accused in the crime. The Investigating Officer has subsequently conducted investigation. He has questioned the relevant witnesses. The attestors to the seizure mahazar have been questioned. It is the case of the detecting official and the Investigating Officer that the information about the complicity of the accused/the petitioner was furnished by the people who were present at the time when the detection was made and seizure was effected. Attestors to the seizure mahazar have been questioned. It is seen from the Case Diary now maintained by the Investigating Officer that there has been subsequent examination of those two witnesses and their version confirms that the petitioner was the one who used to indulge in such business and who did actually conceal the articles on the date in question.

4. It is true that the detecting officer had not obtained statements of the attestors. It is also true that the detecting officer has not specifically incorporated in the seizure mahazar that information about the complicity of the petitioner was obtained and gathered from the attestors to the seizure mahazar. That by itself, according to me, cannot confer on the petitioner

any undeserved advantage or benefit. This is so particularly in the total absence of any allegation of any mala fide attempt by any official to resort to the power of arrest.

5. Powers under Sec.438 of the Cr.P.C. are extraordinary and exceptional. A non-bailable offence so declared by law can be virtually converted into a bailable offence in the facts and circumstances of the particular case by a direction issued under Sec.438 of the Cr.P.C. Great care, caution and circumspection is to be employed before issuing such a direction. The court on the materials available must be satisfied that the powers of arrest which the State and its officials are likely to be abused and misused with oblique or mala fide motives or perversely to vex and harass a citizen. Of course, such powers can also be invoked when the court is satisfied that the invocation of such power of arrest, though not, actuated by mala fides or oblique motives is likely to result in hardship, prejudice and loss of an exceptional nature. At any rate, such powers are not to be invoked, as a matter of course. I do not find any features in this case which would justify the invocation of the extraordinary equitable discretion in favour of the petitioner.

6. I am of opinion that this is a fit case where the petitioner must resort to the ordinary and normal course of appearing

before the Investigating Officer or the learned Magistrate. He must then seek regular bail in the ordinary course.

7. In the result, this bail application is dismissed; but with the observation that if the petitioner surrenders before the Investigating Officer or the learned Magistrate and seeks bail, after giving sufficient prior notice to the Prosecutor in charge of the case, the learned Magistrate must proceed to pass appropriate orders on merits and expeditiously.

Sd/-

(R. BASANT, JUDGE)

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P.S. to Judge